MATTHIESEN, WICKERT & LEHRER, S.C.

A FULL SERVICE INSURANCE LAW FIRM

1111 E. Sumner Street, P.O. Box 270670, Hartford, WI 53027-0670
(800) 637-9176 (262) 673-7850 Fax (262) 673-3766
http://www.mwl-law.com

MONTHLY ELECTRONIC SUBROGATION NEWSLETTER SEPTEMBER 2008

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

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WORKERS' COMPENSATION SUBROGATION

NORTH DAKOTA DECIDES THAT COMPENSATION CARRIER CANNOT SUBROGATE LEGAL MALPRACTICE CLAIM

Haugenoe v. Workforce Safety and Insurance, 748 N.W.2d 378 (N.D. 2008)

Those of you who utilize our workers' compensation subrogation chart, which gives a summary of the subrogation laws of all 50 states, will notice that the chart has "Undecided" listed below the "Legal Malpractice as 3P" column for the State of North Dakota. You can change that to a "No".

On April 22, 2008, the North Dakota Supreme Court decided a case in which an injured worker hired a lawyer to represent him in a medical malpractice case in connection with work-related injuries which were not properly treated. The attorney agreed to also represent the subrogation interests of the workers' compensation carrier. The lawyer mishandled the case, resulting in dismissal of a significant portion of the malpractice claim. The employee then sued the lawyer for legal malpractice. The carrier argued that it should be subrogated to the rights of the employee in the legal malpractice case.

North Dakota State Capitol
Bismarck, North Dakota

The court, noting that a carrier is subrogated for injuries which were sustained under circumstances creating in some person a legal liability to pay damages, held that § 65-01-09 does not grant the carrier (or the Fund in this monopolistic state) a right of subrogation in a legal malpractice action. The court interpreted § 65-01-09 as providing only a "cause of action against a third person for a *compensable injury*," and determined that a legal malpractice claim did not qualify.

We believe the Supreme Court got it wrong, but the opinion stands. The language of the North Dakota statute is similarly worded to the many states which do allow a right of subrogation for legal malpractice. The consolation here is that because North Dakota is a monopolistic state, the decision should not affect too many private carriers - only those who subrogate in North Dakota for benefits paid elsewhere. Nonetheless, the decision requires us to modify our Workers' Compensation Subrogation In All 50 States chart, so we would urge you to make the corresponding change on your printed copy or print off another one. The chart can be found on the left-hand sidebar of our website home page.

WORKERS' COMPENSATION SUBROGATION

Gary L. Wickert

OCIP, CCIP AND WRAP-UP INSURANCE:

The Not So Well-Known Subrogation Obstacles

By Gary L. Wickert

Workers' compensation subrogation has developed another growing adversary, which can slip in during the dark of night, gutting subrogation and reimbursement rights, even after an insurance company or third party administrator has spent thousands of dollars in recovery efforts. It's known as an OCIP, CCIP, or CIP, acronyms which spell trouble for workers' compensation carriers which zealously pursue recovery opportunities.

In an effort to save money in construction settings, some insurers have begun to enter into arrangements with project owners or general contractors, by which the owner or general contractor obtains insurance – including workers' compensation insurance – and thereafter requiring all sub-contractors to be covered under the same policy, something known as a Consolidated Insurance Program (CIP). A CIP is also commonly referred to as "wrap-around or wrap-up insurance". An Owner-Controlled Insurance Program (OCIP) means that the project owner, or general contractor, buys one policy to cover the entire project. All subcontractors are usually enrolled in the project. If the owner purchases the program, it is known as OCIP. If the general contractor purchases the program, it is known as a Contractor Controlled Insurance Program (CCIP). Either way, everyone working at the project site is covered under one liability insurance policy. When the project is bid, each contractor/sub-contractor subtracts out its line-item for liability insurance and the owner receives a portion of the cost of the OCIP premium back in the form of lower construction costs. OCIPs typically provide coverage through substantial completion of construction plus a period of years thereafter, typically ten years. The benefits to the owner are significant because they guarantee they will have coverage and force the limits they selected for the applicable statute, and they can be comfortable that any contractor setting foot on the site is covered.

OCIPs were developed to make the insurance programs used primarily for construction projects more equitable, uniform and efficient. OCIPs eliminate costs of overlapping coverage and delays caused by coverage or other disputes between the parties involved in a project and, at the same time, protect all the contracting parties by bringing the risk of loss from the project within the insurance coverage of the OCIP. By intent and design, OCIPs are most effective for larger construction projects. The owner negotiates the appropriate price and terms of the policies for the project and directly benefits by eliminating the cost of overlapping coverage. The greater the number of contractors involved in the OCIP, and the greater the number of overlapping policies that are eliminated, and the greater are the savings to the owner. The money the owner saves does not come from the contractors' pockets. The contract price is reduced because

insurance costs are not incurred by the project's contractors. The cost of doing the work should be constant, and the owner and contractors would be amply covered by the insurance policies covering the project.

In an OCIP or CCIP program, the owner or contractor takes on the responsibility of the employer for employees of all sub-contractors on the project. The problem arises when a state determines that an owner or contractor which has purchased an OCIP or CCIP program becomes the "statutory employer" of all workers on the job site, giving it immunity from suit under the exclusive remedy bar of that state's workers' compensation laws – essentially immunizing the owner or general contractor from any third party claim of virtually everyone on the job site who is in the contractual chain. Persons within such a program which become immune from suit include a subcontractor or specialty contractor, but generally does not include anyone who merely furnishes materials or supplies without fabricating them into, or consuming them in the performance of, the work of, a contractor. The law in this area varies widely from state to state. The law regarding the effect of OCIPs on subrogation is not yet well-developed in many states, but that is changing.

Nevada leads the pack in dealing with this potentially devastating subrogation-killer. Nevada's § 616A.020(4) provides that the exclusive remedy rule applies to the owner of a construction project who provides an OCIP pursuant to § 616B.710, "to the extent that the program covers the employees of the contractors and subcontractors who are engaged in the construction of the project." If the owner provides OCIP workers' compensation coverage, the owner will be considered an employer and the exclusive remedy rule will apply, at least to the extent that the program covers the employees of the contractors and subcontractors engaged in the construction project.

The law in this area varies greatly from state to state. Texas, for example, recognizes that in an OCIP situation, the owner may be considered a "deemed employer" of employees on the project, but it must be established that the owner actually provided workers' compensation insurance for these employees in order to be immune. *Rice v. H.C. Beck, Ltd.,* 2006 WL 908761 (Tex. Civ. App.- Fort Worth 2006).

A Michigan federal district court has held in an unpublished opinion that when an OCIP is in place, the OCIP effectively transforms all enrolled contractors into the employer of the injured plaintiff. *Stevenson v. HH & N/Turner*, No. 01-CV-71705-DT, 2002 U .S. Dist. LEXIS 26831 (E.D. Mich. 2002). The court found persuasive the fact that Michigan's legislature had enacted regulations governing OCIPs that ensured a "primary condition for approval of the OCIP by the Michigan Department of Consumer and Industry Services is 'liability under this act of each employer to all his or her employees would at all times be fully secured...'."

A Wisconsin federal court, on the other hand, noted that Wisconsin law merely requires that all contractors and subcontractors "shall be included under the wrap-up program" under Wis. Adm. Code. § 80.61(3)(b)(5). *Pride v. Liberty Mutual Ins. Co.*, 2007 WL 1655111 (E.D. Wis. 2007). That court held that if the Wisconsin legislature had truly intended to allow employers at a construction site to bundle together their worker's compensation liability, it would have been simple enough to craft a provision stating that the owner of an OCIP-insured project is deemed the sole employer of any employee of any contractor injured on that project. In Wisconsin, therefore, courts will apply the exclusive remedy rule only when the injured plaintiff is functionally and intentionally fulfilling the role of an employee, because it is only in those cases that the original bargain between employers and employees is fulfilled.

Very few states have established case decisions or statutory law dealing with the effect of OCIPs and the like on subrogation and/or the right of an injured worker to proceed against a third party in a construction setting. Subrogation professionals should be on the lookout for OCIPs and similar programs in large construction setting losses they are confronted with. Finding out early that an OCIP may affect the ability of both the injured worker and subrogated carrier from proceeding with subrogation can save a carrier both time and money – both of which are key components to any successful subrogation program.

THE ODD COUPLE:

WORKERS' COMPENSATION SUBROGATION AND NEW YORK NO-FAULT

By Gary L. Wickert

Workers' compensation subrogation remains a complicated area for subrogation professionals, especially with 51 different statutes and bodies of law to contend with. However, the confusion reaches critical mass when you combine it with the mysteries of American no-fault insurance laws. Nowhere does this potent and odd combination rear its ugly head than in the states of Michigan and New York. Due to the high volume of workers' compensation files handled by carriers in the State of New York, a basic understanding of this volatile combination is a necessary tool for all subrogation professionals.

New York has adopted a system of no-fault automobile insurance laws which require owners of vehicles to carry such insurance with minimum limits of $50,000. N.Y. Ins. Law § 5102 (2002). Under New York law, every owner's policy of liability insurance issued on a motor vehicle in New York must maintain the minimum amount of no-fault coverage required under the insurance law (*i.e.*, basic economic loss [first-party benefits] of up to $50,000), which includes medical and health expenses, loss of earnings from work, and all other reasonable and necessary expenses as mandated by law, which covers an eligible person who is injured as a result of a motor vehicle accident. N.Y. Ins. Law § 5103(a) (2002); N.Y. Ins. Law § 5102(a)(1)(2) and (3) (2002).

If the persons involved in the accident are "covered persons", they cannot sue each other for losses covered (or that should be covered) by PIP. They also cannot sue for pain and suffering types of losses unless there was a "serious injury". N.Y. Ins. Law § 5104(a) (2002). A "covered person" is defined as:

> *Any pedestrian injured through the use or operation of, or any owner, operator or occupant of, a motor vehicle which has in effect the financial security required by article six or eight of the vehicle and traffic law or which is referred to in subdivision two of section three hundred twenty-one of such law; or any other person entitled to first-party benefits.* N.Y. Ins. Law § 5102(j) (2002).

In an accident between two "covered persons", the victim recovers "first-party benefits" from his own PIP carrier. N.Y. Ins. Law § 5102(b) (2002). "First-party benefits" means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less: (1) twenty percent of lost earnings computed pursuant to paragraph two of subsection (a) of this section; (2) amounts recovered or recoverable on account of such injury under state or federal laws providing social security disability benefits, workers' compensation benefits, disability benefits under article nine of the workers' compensation law, or Medicare benefits, other than lifetime reserve days and provided that the Medicare benefits utilized herein do not result in a reduction of such person's Medicare benefits for a subsequent illness or injury; and (3) amounts deductible under the applicable insurance policy. N.Y. Ins. Law § 5102(b) (2002).

As for personal injury lawsuits between the parties, the no-fault law only allows lawsuits to recover two types of damages from a covered person: (1) "pain and suffering" where there is serious injury as defined in § 5102(d) (2002); and (2) economic losses (*i.e.*, medical bills, lost wages, etc.) that go beyond what should

be covered by PIP (basic economic loss). N.Y. Ins. Law § 5102(a) (2002). "Basic economic loss" is up to a total aggregate of $50,000 per victim for the following losses resulting from the accident: (1) health expenses; (2) lost earnings up to $2,000 per month, for up to three years; (3) other "out-of-pocket" expenses (*e.g.*, housekeeping) up to $25 per day for up to one year. N.Y. Ins. Law § 5102(a) (2002). PIP payments to the victim covering basic economic loss are reduced by offsets reflecting:

(1) Income taxes the claimant does not pay on no-fault payments compensating for lost earnings;
(2) Collateral payments, such as workers' compensation, the claimant receives on account of the accident; and
(3) Allowable insurance policy deductibles per § 5102(b).

The no-fault law only precludes recovery of basic economic loss for an accident which occurs in New York. *Federal Ins. Co. v. Barsky*, 267 A.D.2d 275 (N.Y. 2nd Dept. 1999). A person is not a "covered person" if their vehicle is insured by a company not authorized in New York or not meeting New York's required liability coverage. This is because the definition of "covered person" requires having insurance that meets the requirements of V&T 311(4), which states that automobiles registered in New York must be insured by an "insurer duly authorized to transact business in" New York. See *Carbone v. Visco*, 115 A.D.2d 948, 497 N.Y.S.2d 524 (N.Y. 4th Dept. 1985). This is because the no-fault statute only precludes recovery by one "covered person" against another "covered person". "Covered person" is anyone who is covered under PIP. N.Y. Ins. Law § 5102(j) defines a "covered person" as: "Any pedestrian injured through the use or operation of, or any owner, operator or occupant of, a motor vehicle". The definition of a "motor vehicle", provided in § 5102(f) excludes a motorcycle. Several cases have therefore held that a motorcycle driver can sue for pain and suffering even without meeting the "serious injury" requirement. Motorcycles may recover "basic economic loss" and are not subject to the "serious injury" requirement before recovering pain and suffering. See *Goodkin v. U.S.*, 773 F.2d 19 (2nd Cir. 1984); *Laba v. Petrullo*, 191 Misc.2d 758, 742 N.Y.S.2d 787 (Dist. Ct. Nassau Cty., 2002) (indicating that a non-covered person is entitled to recover for economic loss).

In accidents between a "covered person" and a non-covered third-party, the covered person may recover basic economic loss (*i.e.*, the losses covered by PIP) from a party at fault for the accident. N.Y. Ins. Law § 5104(b) (2002). By extension, this will mean that the insurer who pays PIP benefits or a workers' compensation carrier who pays benefits may recover from a non-covered person who is at fault. The PIP carrier or workers' compensation carrier who paid "PIP-type" damages can then subrogate.

In PIP subrogation, if the covered person sues the non-covered person within two years of the accident, the covered person's insurance company has a lien against their recovery for the amount of PIP they paid. This means that the insurance company gets a portion of its insured's recovery equal to their PIP payments. So, if the insurer has paid $25,000 in PIP, and the insured obtains a $30,000 judgment, the insured receives $5,000, and the insurance company receives $25,000. Note that PIP bills will be considered in the case when the judge or jury assigns damages. In addition, the insured must protect the rights of the insurance company. This means that they cannot settle the case without the insurance company's permission unless a judge signs off, or the recovery is at least $50,000, so that they can be certain they can pay back all of the insurance company's PIP losses. If the insured does not sue within two years of the accident, the insurance company may then directly sue the non-covered person at fault to recover its PIP costs. In this case, the insured can still file suit as well, but will not be able to sue for the PIP losses, since the insurance company has already sued for that.

Even when both parties are "covered persons", the law allows for two PIP carriers or a workers' compensation carrier ("insurer liable for the payment of first-party benefits") and the insurer for the other

vehicle to engage in inter-company "Loss Transfer" in two specific situations. If a PIP carrier or workers' compensation policy pays first-party-type damages, they may recover against a responsible party provided that one of the motor vehicles involved in the accident either (1) weighs 6,500 pounds unloaded, or (2) is a vehicle for hire (*e.g.*, a taxi or a vehicle used in shipping goods). N.Y. Ins. Law § 5105(a) (2002). The vehicle which is more than 6,500 pounds or a vehicle for hire need not be the vehicle at fault in the accident.

However, in order to recover under § 5105(a), the workers' compensation carrier must take the other insurer to binding arbitration. Insurers who disagree as to which company should provide PIP benefits must also arbitrate this question. In 11 N.Y.C.R.R. § 65.10(b), the Superintendent selected Arbitration Forums as the exclusive arbitrator for these matters. N.Y. Ins. Law § 5105(b). 11 N.Y.C.R.R. § 65.10 contains all of the arbitration rules. The statute of limitations for such an arbitration claim begins to run from the date of the payment – not the date of the accident. See *Motor Vehicle Acc. Indemnification Corp. v. Aetna*, 89 N.Y.2d 214, 652 N.Y.S.2d 584 (N.Y. 1996). The right to recover PIP from a covered person is a statutory right that attaches with each PIP payment. So, if the date of loss was January 5, 2005, and the first PIP payment was made on January 10, 2005, then arbitration must be initiated by January 10, 2008 in order to recover for all payments. If arbitration is filed thereafter, it will be timely for any payments made less than three years before the arbitration was initiated. Filing a lawsuit instead of arbitrating will properly preserve the statute to arbitrate. See 11 N.Y.C.R.R. § 65.10(d)(5)(i). This section also states that if there is a dispute as to coverage pending, the running of the statute of limitations is delayed until the matter is resolved.

Because this Loss Transfer action is a statutory right and not a tort, there is also no requirement of giving a tort claims notice before seeking recovery of PIP from a city or the state. This is because Loss Transfer is a case against an insurance company, not against the city. If the city is self-insured, the Loss Transfer case is still treated as a case against an insurance company. *City of Syracuse v. Utica Mut. Ins. Co.*, 83 A.D.2d 116, 443 N.Y.S.2d 901 (N.Y. 4th Dept. 1981), aff'd 61 N.Y.2d 691, 460 N.E.2d 1085, 472 N.Y.S.2d 600 (N.Y. 1984).

In Loss Transfer cases, a release by the insured will not be a defense. This is because it is not a right that is "subrogated" from the insured, and therefore the insured has no power to destroy it. *State Farm Mut. Auto. Ins. Co. v. City of Yonkers*, 21 A.D.3d 1110, 801 N.Y.S.2d 624, (N.Y. 2nd Dept. 2005); *Doherty v. Barco Auto Leasing Co.*, 144 A.D.2d 424 (N.Y. 2nd Dept. 1988). Note, however, that such is not the case for "additional PIP", which is a classical subrogation right. *Nationwide Ins. Co. v. Mocchia*, 663 N.Y.S.2d 640 (N.Y. 2nd Dept. 1997). Sections 5104(b) and 5105(a) provide the exclusive remedy for insurers (PIP or workers' compensation) seeking to bring an action to recoup "first-party benefits" or the first $50,000 of no-fault benefits paid to their insured. However, they do not bar a subrogation claim to recover the remaining amount of Additional PIP ("APIP") benefits or workers' compensation benefits paid which are in excess of the non-recoverable $50,000. *Allstate Ins. Co. v. Mazzola*, 175 F.3d 255 (3rd Cir. 1999). The statute of limitations for recovery of APIP (including workers' compensation benefits) is three years from the date of the accident even if the first payment was not made within three years of the accident. *Allstate Ins. Co. v. Stein*, 1 N.Y.3d 416, 775 N.Y.S.2d 219 (N.Y. 2004).

APIP not covered by PIP may be recovered even if the serious injury threshold otherwise required for a third-party action is not reached. *Colvin v. Slawoniewski*, 15 A.D.3d 900, 789 N.Y.S.2d 368 (N.Y. 4th Dept. 2005); *Tortorello v. Landi*, 136 A.D.2d 545, 545-546, 523 N.Y.S.2d 165 (N.Y. 2nd Dept. 1988). This is because § 5104 only excludes basic economic loss, and only requires serious injury for recovery of non-economic losses.

Therefore, there is generally no compensation lien on the proceeds of a recovery under the no-fault laws which were for first-party benefits under that law. Neither the subrogated carrier nor the injured worker can

pursue such benefits based on New York's no-fault system. As with an automotive carrier, a tortfeasor may only be pursued if more than the amount of "first-party" benefits (APIP) is involved.

To the extent that the compensation benefits paid by the carrier exceed the statutorily defined "basic economic loss", the carrier is entitled to a lien against such damages. *Johnson v. Buffalo & Erie County Indus. Council*, 84 N.Y.2d 13 (N.Y. 1994); *Fellner v. Countrywide Ins. Co.*, 95 A.D.2d 106 (N.Y. 3rd Dept. 1983); *Goldberg v. State Ins. Fund*, 202 A.D.2d 781 (N.Y. 3rd Dept. 1994); *Kesick v. Ulster County Self-Insured Ins. Plan*, 245 A.D.2d 753 (N.Y. 3rd Dept. 1997). However, where a worker recovers against a "non-covered" defendant for economic loss, the carrier has a lien for all benefits paid because there is no bar for the plaintiff recovering such items as damages in the third-party action and the imposition of a lien prevents a "double recovery". *Stedman v. City of New York*, 107 A.D.2d 600 (N.Y. 1st Dept. 1985).

It should be noted that the right of a worker's compensation carrier to seek Loss Transfer has been narrowed and defined by the State of New York's Insurance Department. See **http://www.ins.state.ny.us/ogco2002/rg021119.htm** (11/22/02). Recovery by a workers' compensation carrier under Loss Transfer for amounts paid is strictly limited to "the payment of first-party benefits" made for basic economic loss. Under N.Y. Workers' Comp. Law § 15, scheduled loss awards are made to injured employees for temporary or permanent, total or partial disabilities, based upon monetary schedules.

The § 15 scheduled awards are separate and apart from payments made by workers' compensation carriers for medical benefits and are akin to "pain and suffering" damages when eligible under the No-Fault law. The Office of General Counsel issued a formal opinion on November 22, 2002, in which it held that a workers' compensation carrier does not have a right to recover workers' compensation schedule awards made to employees from the no-fault insurer of a tortfeasor vehicle. The Office of General Counsel opined that in enacting the Loss Transfer provisions of § 5105, the legislature made it clear that in the two limited instances where a no-fault insurer has a right to recover amounts paid from the no-fault carrier of the tortfeasor vehicle, recovery for amounts paid is strictly limited to "the payment of first-party benefits" made for basic economic loss. This applies when either vehicle weighs more than 6,500 pounds or is used "principally for transporting persons or property for hire".

The term "first-party benefits" is defined to mean payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less certain deductions, including amounts recovered or recoverable on account of such injury from workers' compensation benefits (in which case workers' compensation coverage is primary). N.Y. Ins. Law § 5102(b) (2002). The term "non-economic loss" is defined as "pain and suffering and similar non-monetary detriment". N.Y. Ins. Law § 5102(c) (2002). Payments for pain and suffering may be due when a vehicle occupant suffers "serious injury" as defined under New York law. N.Y. Ins. Law § 5102(d) (2002). Therefore, when a "serious injury" is suffered, the injured party is permitted to sue tortfeasors in the other vehicles involved in the accident under their third-party liability coverage for non-economic loss. Under New York workers' compensation law, loss awards are made to injured employees for temporary or permanent, total or partial disabilities based on monetary schedules.

When workers' compensation coverage is primary, the limited right to § 5105 Loss Transfer is given to "any compensation provider paying benefits in lieu of first-party benefits…" so that benefits paid pursuant to § 5105(a) by workers' compensation insurers are limited to benefits which are the equivalent of first-party benefits reimbursable under no-fault basic economic loss. Consequently, payments made for § 15 workers' compensation awards which encompass pain and suffering are excluded from Loss Transfer in the same way that recovery for no-fault serious injury damages which encompass pain and suffering are also excluded from Loss Transfer under § 5105. Accordingly, the Office of General Counsel, in its November 22, 2002 informal opinion, has concluded that

workers' compensation scheduled loss awards paid by workers' compensation insurers to injured workers are not recoverable in Loss Transfer arbitrations.

Therefore, there are limited rights of subrogation for no-fault benefits in situations involving accidents between covered parties. However, in situations involving an accident between a covered and non-covered party, the workers' compensation carrier has a lien against the insured's recovery in a personal injury suit against the non-covered individual, or a right to sue if the insured does not. In cases in which some tortfeasors are covered and some are not, the lien applies to the recovery against the non-covered party only and is governed percentage-wise by the non-covered party's liability. New York case law provides that an insurer who pays out first-party benefits or workers' compensation benefits in lieu thereof is afforded the mandatory inter-company arbitral process to recoup payment of those benefits through a Loss Transfer. *State Farm Mut. Auto. Ins. Co. v. City of Yonkers*, 801 N.Y.S.2d 624 (N.Y. A.D. 2005). An insurer does not lose its Loss Transfer rights as part of a personal injury settlement absent an "express waiver" of those rights.

Far too many carriers fail to recognize or neglect to act on workers' compensation subrogation in the State of New York. Trial lawyers make representations about legal obstacles to recovery which may or may not be accurate, and confusion and a lack of understanding of the law may intimidate some claims handlers and subrogation professionals into being less aggressive than they should be. However, armed with the law, missed subrogation opportunities in New York should become a thing of the past.

WORKERS' COMPENSATION SUBROGATION

CHRIS MILLER PRESENTS AT 4TH ANNUAL WORKERS' COMPENSATION SUBROGATION STRATEGIES EXECUSUMMIT

"*Subrogation Investigation in Workers' Compensation Claims*"

Christopher M. Miller

There are very few areas in which the laws of each individual state vary more and are applied as differently, than in the area of workers' compensation subrogation. On June 11, 2008, Attorney Chris Miller, a senior associate with MWL, presented *"Subrogation Investigation in Workers' Compensation Claims*" at the 4th Annual Workers' Compensation Subrogation Strategies ExecuSummit in New York. According to ExecuSummit, excellent feedback has been received on this presentation.

This presentation focused on providing the workers' compensation claims professional with the tools necessary to understand the different issues which must be dealt with when subrogating a claim, such as product liability, borrowed servant, warranty, evidentiary and contractual issues, anti-subrogation arguments, spoliation, notice requirements, and use of experts, just to name a few. Understanding the concepts and utilizing the tools this presentation provides will allow the prudent and proactive claims professional to know precisely which issues must be delved into during investigation of a claim. Although workers' compensation subrogation has been around for more than ninety years, the true benefits of the carrier's statutory rights of reimbursement, until recently, have been mostly ignored and under utilized. Insurance carriers simply did not actively pursue subrogation. Instead, carriers let the claimants' attorneys do the work for them, which often resulted in compromised liens. Inactivity in subrogation has been a major contributor of losses in the insurance industry, just as turning the tables on plaintiffs' attorneys and emphasizing subrogation has been instrumental in increasing overall profitability for some carriers.

As many carriers attempt to both centralize their subrogation efforts and improve their investigation, subrogation professionals are faced with the daunting challenge of becoming knowledgeable with the subrogation laws of many different states. Claims professionals must familiarize with the nuances of multi-state workers' compensation subrogation and to educate claims professionals on the various issues which have become vogue in the subrogation arena and are essential for effective subrogation recoveries. Claims handlers, who are not familiar with subrogation law and its advanced concepts, will be ill-equipped to deal with the various defenses and roadblocks which are ultimately thrown in their path. Prompt and effective action must be taken by competent subrogation personnel or subrogation counsel immediately upon recognition or suspicion of third-party liability for a workers' compensation carrier's claimant's injuries, in order to effect a complete recovery of a workers' compensation lien.

If your company/group is interested in having MWL come in and present this seminar, please contact our marketing coordinator, Jamie Breen, at jbreen@mwl-law.com. MWL has been providing seminars to clients for more than a decade throughout North America and remain one of the leaders in continuing subrogation education for the insurance industry. While there are costs in both time and travel associated with presentation of seminars and classes, we offer these programs completely free-of-charge to clients for whom we handle a volume of work. Many of our clients have sent us more recovery work to get discounts on our seminars or, if the volume of work referred is sufficient, to receive our seminars completely free-of-charge.

The cost and timing of seminars for newer and potential clients and friends of our firm must be discussed on a case-by-case basis as there may be some travel and/or presentation costs involved - although our goal is to keep costs down in order to make our seminars affordable - we are all about cost-effectiveness. We're working on producing webinars and live internet seminars, but good things move slowly. Please feel free to contact our marketing coordinator, Jamie Breen, at jbreen@mwl-law.com regarding obtaining a cost estimate for one of our seminars anywhere in North America (we come to you) or for coordinating the scheduling of such seminars. A complete list of the seminars offered by MWL, along with course descriptions, can be found on our website at www.mwl-law.com.